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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re N.C., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

E059723

(Super.Ct.No. J246543)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Christopher B.  
Marshall, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Jean-Rene Basle, County Counsel, and Regina A. Coleman, Principal Assistant  
County Counsel, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant, J.M. (Mother), appeals from orders terminating parental rights to her sixth child, N.C., and placing N.C. for adoption. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> Mother was offered no services for N.C. because her parental rights to her five older children were terminated in prior proceedings. (§ 361.5, subd. (b).)

Mother claims the juvenile court abused its discretion in denying her section 388 petition for custody or services for N.C., and in concluding at the section 366.26 hearing that the parental benefit exception to the adoption preference did not apply. (§ 366.26, subd. (c)(1)(B)(i).) We find no merit to these claims and affirm the orders.

## II. FACTS AND PROCEDURAL HISTORY

### A. *The Circumstances Underlying N.C.'s Dependency*

N.C. was born in April 2010. In October 2012, when N.C. was 30 months old, Mother was arrested for child cruelty. (Pen. Code, § 273a, subd. (a).) She allegedly choked N.C. while she and N.C. were living with family members. Mother was on top of N.C., straddling her, and had her hands around N.C.'s neck. N.C.'s body went limp and her eyes rolled back. Mother had been drinking, appeared intoxicated, and was uncooperative with police. She denied choking N.C. and claimed she only “grabbed her . . . ‘to hug her.’” N.C. suffered no physical injuries and was detained in foster care.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother's parental rights to her five older children were terminated in 2006, 2007, and 2009, and the older children were adopted by nonrelatives. Mother had an extensive history of abusing methamphetamine, cocaine, and aerosol sprays, and had failed to benefit from drug treatment programs and other services. Mother had a 2005 misdemeanor conviction for child cruelty. (Pen. Code, § 273, subd. (a).) She served 45 days in jail and was placed on 48 months' probation for the offense.

In November 2012, Mother pled guilty to willful cruelty to a child based on the October 2012 choking incident with N.C. (Pen. Code, § 273, subd. (a).) Mother told the social worker she had been diagnosed with depression and was bipolar; she was taking medication for these conditions; and she had been receiving supplemental security income (SSI) for six years. The social worker stated Mother "expressed a great deal of love" for N.C. but still had the same problems that led to termination of her parental rights to her older children.

#### *B. Jurisdiction and Disposition*

At a December 2012 jurisdictional/dispositional hearing, the court sustained jurisdictional allegations under section 300, subdivisions (a), (b), and (g), declared N.C. a dependent, and ordered her removed from Mother's care. Reunification services for Mother were ordered bypassed and denied under section 361.5, subdivisions (b)(10), (11), (13), and (e)(1), a section 366.26 hearing was set, and Mother was allowed supervised visits with N.C. for one hour each month, beginning upon her release from custody.

*C. N.C.'s Progress and Mother's Visits With N.C.*

In November 2012, N.C.'s first foster mother reported that N.C. was very aggressive and having difficulty getting along with other children. She hit an infant, scratched and bit another two year old, and threw objects at people. A family member had previously observed N.C. biting, hitting, and pinching people and believed Mother had done these things to N.C. Due to her aggressive behavior, N.C.'s first foster mother asked her to be removed from her home.

N.C. was placed with a second foster family in January 2013. In January 2013, it was further reported that N.C. also exhibited "self-inflicting" behavior, including punching herself in the face and "free fall" dropping to the floor. She was also "obsessed with eating" and would "stuff her mouth with food" even after she had had enough to eat.

Mother was released from custody in January 2013 and began visiting N.C. at that time. Mother spoke to N.C. in Spanish and N.C. appeared to understand. Mother acted appropriately during visits and N.C. appeared to be comfortable with Mother. Mother missed her February 2013 visit.

On March 28, 2013, N.C. underwent initial "Screening, Assessment, Referral and Treatment" (SART) testing. Her new foster mother believed Spanish was her primary language and the failure to recognize this was the source of many of her problems. N.C. was doing much better at the time of the testing; she had stopped hoarding food and bullying other children.

N.C. was very withdrawn during the testing, however, and would not perform many of the testing activities. She still had a limited vocabulary, and plaintiff and respondent, San Bernardino County Children and Family Services (CSF), was seeking a special needs home for her. She was born prematurely at 35 weeks gestation and weighed four pounds at birth. She was almost three years old in March 2013 and was still being potty trained.

On May 31, 2013, N.C. was placed with a maternal great-aunt and great-uncle, her prospective adoptive family. The caretakers intended to maintain contact with Mother as long as it was in N.C.'s best interests. The maternal great-aunt supervised Mother's visits, and reported N.C. did not recognize Mother as a familiar person. At the end of the visits, N.C. would say "bye" to Mother, and was not upset after the visits. N.C. was adjusting well and bonding with her prospective adoptive family. On June 17, the social worker heard N.C. tell her prospective adoptive mother she loved her.

#### *D. Mother's Section 388 Petition*

On August 28, 2013, Mother filed a section 388 petition seeking custody of N.C. or reunification services and liberalized overnight and weekend visitation. The petition stated Mother had completed more than half of a 52-week child abuse program at the New Day Institute Counseling Centers; had stable housing for herself and N.C.; was compliant with her medication; and was participating in counseling and anger management classes. Mother loved N.C., was bonded to her, and believed it was in N.C.'s best interest to be raised by Mother.

The petition included a certificate of achievement from Volunteers of America Family Resource Center for completing its “Nurturing Parenting Program” in July 2013 and probation department child abuse program reporting forms for July and August 2013. The reports indicated Mother was continuing to improve in “most areas and techniques of positive parenting skills.” However, the last report indicated Mother only “sometimes” admitted to violence “with no minimizing, no blaming, no excuses and no denial”; only “sometimes” took steps to avoid violence and had good communication and noncontrolling conflict resolution skills; and only “sometimes” showed “insight concerning abusiveness, its [e]ffects on partners and children and its dangerousness.”

An August 26 letter from New Day Institute Counseling Centers reported Mother had attended nine individual counseling sessions over the course of two months and was showing personal growth and improved parenting skills. Additionally, Asante Family Agency reported Mother had completed eight of 16 anger management classes. She shared and listened well during classes and her prognosis was “[f]air.” She was unable to read and write, which made “some material . . . difficult” for her, and she needed more time to develop the skills.

CFS filed a response to the petition. On September 11, the social worker visited Mother in her home, a small, one-bedroom mobile home that belonged to Mother’s fiancé, A. Mother and A. had been together for 10 months and Mother had lived in A.’s home for two months. A. had a 2012 misdemeanor conviction, an open CFS case for his six-year-old son for whom he was receiving reunification services, and his ex-girlfriend

had a restraining order against him. Mother was on probation and was complying with all of its terms and conditions, including monthly alcohol and drug testing. She claimed she was permanently disabled due to anxiety attacks, depression, and bipolar disorder, and she was receiving \$750 per month in SSI.

The social worker opined there was not a “significant change” of circumstances in Mother’s situation to warrant returning N.C. to her care or granting her services. Nor would it be safe for N.C. to have overnight unsupervised visits with Mother.

Furthermore, the social worker had observed Mother and N.C. during visits and did not believe N.C. was bonded or attached to Mother. N.C. did not react to Mother at the beginning or the end of the visits, and Mother had to entice N.C. with toys, food, or her cell phone. Accordingly, CFS recommended denying Mother’s petition, terminating parental rights, and placing N.C. for adoption.

The court set a hearing on the petition and the hearing was held before the section 366.26 hearing on September 30, 2013. No witnesses testified. Mother’s counsel argued Mother had completed a significant amount of services on her own, and had therefore shown an ability and willingness to complete any additional services the court would require of her. Mother’s counsel also pointed out that N.C. had only been out of Mother’s custody for a short time, was three years old, and knew Mother. N.C.’s counsel pointed out that Mother was doing little more than complying with the terms and condition of her probation by participating in services; Mother had “choked the child”;

had “a very large substance-abuse problem”; and did not enroll in counseling until mid-2013, despite having been released from custody in January 2013.

County counsel noted there was no evidence Mother had done anything to address her substance abuse problem, was under the influence when she choked N.C., and “something worse could have happened” to N.C. had family members not intervened and stopped Mother. Mother’s current living situation is also a concern, and Mother and N.C. were not strongly bonded. Thus, counsel argued Mother had not shown she had changed the circumstances underlying N.C.’s dependency or that granting her requests would serve the child’s best interest.

The juvenile court denied the petition. While applauding Mother for her efforts, the court noted Mother offered no evidence that she had addressed her substance abuse problem; no psychiatrist said Mother had been taking her medication; and no therapist was recommending returning N.C. to Mother’s care. The court also expressed concern whether N.C. would be safe in A.’s home. Thus, the court found no changed circumstances or new evidence, or that N.C.’s best interest would be served by granting any part of the petition. The court proceeded to the section 366.26 hearing.

#### *E. The Section 366.26 Hearing*

No witnesses testified at the section 366.26 hearing, and the court decided the matter based on CFS reports and the arguments of counsel. Mother’s counsel agreed that N.C. was adoptable, but objected to terminating parental rights based on the parental benefit exception. The court found the parental benefit exception did not apply.

Although Mother had maintained regular contact with N.C., the court found that the CFS reports showed Mother did not assume a parenting role during visits and was “more of a friendly visitor.” The court terminated parental rights and placed N.C. for adoption.

### III. DISCUSSION

#### A. *Mother’s Section 388 Petition Was Properly Denied*

Mother claims the juvenile court abused its discretion in denying her section 388 petition. We conclude the petition was properly denied.

##### 1. Section 388

Section 388 permits “[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court” to petition the juvenile court ““for a hearing to change, modify, or set aside any order of court previously made”” on grounds of ““change of circumstance or new evidence.”” (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463.) The petitioner has the burden of showing by a preponderance of the evidence that there has been a legitimate change of circumstances or new evidence, and that the proposed change of court order would promote the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; Cal. Rules of Court, rule 5.570(h).) The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal unless an abuse of discretion is clearly shown. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].)

Section 388 is central to the constitutionality of the dependency scheme. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) After a parent’s reunification services have been

terminated, the parent's interest in the care, custody, and companionship of the child are no longer paramount, and the focus shifts to the child's need for permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re Marilyn H.*, *supra*, at p. 309.) It is at this point that section 388 "plays a critical role in the dependency scheme." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.) The statute serves as an "escape mechanism" for parents who "complete a reformation" before their parental rights have finally been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.)

## 2. Analysis

Mother argues the juvenile court abused its discretion in denying her section 388 petition because she showed a "marked change in circumstances," and had made "terrific strides in addressing the issues that had gotten her arrested" for child cruelty in October 2012. She argues she was able and willing to participate in any services the court would require of her in order to have N.C. returned to her care.

Regarding N.C.'s best interests, Mother points out that N.C. lived with Mother until she was 30 months old but had only been living with her prospective adoptive family for four months. Thus, because N.C. had "a longer period of bonding" with Mother than with her prospective adoptive family, her best interest would be served by giving Mother services and an opportunity to reunify with her.

We disagree the juvenile court abused its discretion in denying Mother's petition. To be sure, Mother made a substantial and commendable effort to change the circumstances underlying N.C.'s dependency by attending individual counseling

sessions, as well as parenting and anger management classes. She was making substantial progress in learning new parenting and anger management skills. She was also taking her medication and controlling her mental health issues.

But as the court pointed out, Mother's circumstances had not changed sufficiently or to such a degree to warrant granting her custody, services, or liberalized visitation. Mother had apparently done nothing to address her longstanding substance abuse problem which resulted in her 2012 arrest and conviction for child cruelty to N.C. and N.C.'s dependency. Mother's substance abuse problem also resulted in the loss of her parental rights to her five older children between 2006 and 2009.

The court also reasonably concluded that N.C.'s best interest would not be served by granting any of the relief requested in Mother's petition. As the court noted, CFS reports consistently showed N.C. did not share a strong bond with Mother. The reports also showed N.C. was stable and happy with her prospective adoptive family, and was no longer aggressive or hoarding food. By contrast, Mother's living situation was apparently unstable and posed risks of harm to N.C.

*B. The Parental Benefit Exception Did Not Apply*

Mother claims the court further erred in finding that the parental benefit exception to the statutory adoption preference did not apply. Again, we find no abuse of discretion.

1. The Parental Benefit Exception

At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38,

50.) Permanent plans include adoption, guardianship, and long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296.) “Adoption, where possible, is the permanent plan preferred by the Legislature.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.)

Adoption involves terminating the legal rights of the child’s natural parents, but guardianship and long-term foster care leave parental rights intact. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 574.) “Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.” (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344.)

To avoid adoption and termination of parental rights at a section 366.26 hearing, a parent has the burden of showing one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, subdivision (c)(1)(A) or (B) apply. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469; *In re Celine R.* (2003) 31 Cal.4th 45, 53.) These exceptions “merely permit the court, in *exceptional circumstances* (*In re Jasmine D.* [(2000) 78 Cal.App.4th 1339,] 1348-1349), to choose an option other than the norm, which remains adoption.” (*In re Celine R., supra*, at p. 53.)

The parental benefit exception applies when two conditions are shown: the parent has “maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i), italics added; *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) In order to show that the child would benefit from continuing the relationship with the parent, the parent “must do more than demonstrate

. . . an emotional bond with the child”; the parent “must show that he or she occupies a ‘parental role’ in the child’s life.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

The parent must also show that the parent-child relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

“‘The balancing of competing considerations must be performed on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs. [Citation.] When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.’ [Citation.]” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1349-1350.) In other words, “[i]f severing the existing parental relationship would deprive the child of ‘a substantial, positive emotional attachment such that the child would be greatly harmed, the

preference for adoption is overcome and the natural parent's rights are not terminated.' [Citation.]" (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.)

## 2. Standard of Review

Appellate courts have traditionally applied either the substantial evidence test or the abuse of discretion test in considering challenges to juvenile court determinations that the parental benefit exception did not apply. (*In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469.) There is little, if any, practical difference between the two. (*Ibid.*)

As explained in *In re Jasmine D.*: "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "if [it] find[s] that . . . no judge could reasonably have made the order that he did.' . . ." [Citations.]" (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)<sup>2</sup>

## 3. Analysis

Mother claims the juvenile court abused its discretion in finding that the parental benefit or beneficial relationship exception did not apply. We disagree.

Though Mother maintained regular contact with N.C., the court reasonably concluded that the benefits to N.C. of being adopted substantially outweighed any benefit

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<sup>2</sup> More recently, courts have applied a composite standard of review, recognizing that the parental benefit exception entails both factual and discretionary determinations. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [substantial evidence standard applies to factual determination where a beneficial relationship exists, and abuse of discretion standard applies to discretionary determination where there is a compelling reason to apply the exception]; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622 [same].)

N.C. would realize from continuing her relationship with Mother. N.C. was only three and one-half years old at the time of the section 366.26 hearing and very much needed stability, permanency, and proper care. While in Mother's care and shortly thereafter, N.C. acted aggressively toward other children, including biting, hitting, and scratching, and had a food anxiety as indicated by her overeating and hoarding food. These problems were resolved following her placement in foster care and did not resurface after she began living with her prospective adoptive family. Mother did not demonstrate a current ability to meet N.C.'s needs or properly care for her.

Further, there was no evidence that terminating parental rights and severing N.C.'s relationship with Mother would greatly harm N.C. (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1235.) Substantial evidence shows N.C. had no "substantial, positive emotional attachment" to Mother. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Though Mother claims N.C. cried at the end of one visit, there is no indication N.C. suffered any persistent separation anxiety following any of her visits with Mother. Without question, N.C.'s behavior improved substantially, and she was no longer exhibiting aggressive, anxious or "self-inflicting" behavior following her removal from Mother's care.

#### IV. DISPOSITION

The orders terminating parental rights and selecting adoption as N.C.'s permanent plan are affirmed.

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KING  
J.

We concur:

RAMIREZ  
P. J.

RICHLI  
J.